U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 17 July 2003

Case No.: 2002-BLA-05272

In the Matter of:

ELMER GEORGE
Claimant

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest.

Appearances:

ARTHUR FRANKLIN, JR., Esquire
For Claimant

SUSAN M. JORDAN, Esquire
For Director

Before: JANICE K. BULLARD
Administrative Law Judge

DECISION AND ORDER
DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. § 901, et seq., (hereinafter "the Act") and the regulations issued thereunder, which are found in Title 20 of the Code of Federal Regulations. Regulations referred to herein are contained in that Title.[1]

Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a dust disease of the lungs resulting from coal dust inhalation.

[1]The regulations cited are the revised regulations, effective January 19, 2001, found at 20 C.F.R. § 718, et. seq. (2001).

On June 25, 2002, this case was referred to the Office of Administrative Law Judges for a formal hearing. A hearing was held before me on December 18, 2002, in Reading, Pennsylvania, whereat the parties had full opportunity to present evidence and argument. By letter dated February 10, 2003, counsel for the Director submitted notice that the parties had entered into a joint stipulation regarding the length of the miner's coal mine employment, which has been admitted into evidence and is identified in the record as DX-47. The parties waived the filing of post-hearing briefs.

I. ISSUES

The parties have stipulated that Claimant worked for 14 years in coal mine employment. DX-47.[2] The remaining issues presented for resolution are:

1. whether Claimant has pneumoconiosis;

2. whether Claimant's pneumoconiosis arose out of coal mine employment;

3. whether Claimant is totally disabled, and if so;

4. whether Claimant's total disability arose out of his coal mine employment;

II. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. Procedural Background

This proceeding arises from a claim for living miner's benefits filed by Elmer George ("Claimant") on January 22, 2001. DX-2. The District Director denied this claim on May 9, 2002. DX-31. Claimant requested a formal hearing (DX-32) and the case was forwarded to OALJ (DX-34). The hearing was held on December 18, 2002.

B. Factual Background

Claimant was born on September 22, 1944. DX-2. He is a high school graduate. Id. Claimant married Lee Ann Saul on August 9, 1968 (DX-8) and she is his only dependent for purposes of augmentation of benefits under the Act.

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[2]The following abbreviations are used herein: "DX" refers to Director's Exhibit; "CX" refers to Claimant's Exhibit; and "TR" refers to the transcript of the December 18, 2002 hearing.

At the hearing, Claimant testified about his coal mine employment with various coal mine companies, and described his duties. Mr. George said that he worked in the mines, digging and pushing buggies that carried coal, and then delivering the coal to breakers. TR at 7-9; 22-27. He also worked as a screener, and ran a loader. TR at 32-38. Claimant said that he first sought treatment from Dr. Raymond Kraynak in March, 2000, when he was experiencing a problem with his knees. TR. at 43. He continues to see Dr. Kraynak for a breathing problem that he understands is caused by black lung disease. TR. at 15, 43. His medications include a Combivent inhaler, Flomax, and a syrup for a cough. Id. Claimant stated that his breathing has worsened over time, and that he is short of breath with any amount of exertion. Id.

C. Entitlement

This claim was filed after the enactment of the Part 718 regulations, and, therefore, Claimant's entitlement to benefits will be evaluated under Part 718 standards. 20 C.F.R. § 718.2. In order to establish entitlement to benefits under Part 718, Claimant must prove that he has pneumoconiosis, that it arose out of his coal mine employment, and that the pneumoconiosis has caused him to be totally disabled. Claimant has the burden of establishing each element of entitlement by a preponderance of the evidence. Director, OWCP v. Greenwich Collieries, 512 U.S. 267 (1994). Claimant is credited with 14 years coal mine employment, as stipulated by the parties and supported by the evidence of record.

1. Presence of Pneumoconiosis

There are four means of establishing the existence of pneumoconiosis, set forth at 20 C.F.R. § 718.202(a)(1) through (4):

1. X-ray evidence. Section 718.202(a)(1).

2. Biopsy or autopsy evidence. Section 718.202(a)(2).

3. Regulatory presumptions. Section 718.202(a)(3).

   (a) section 718.304. Irrebuttable presumption of total disability due to pneumoconiosis if there is evidence of complicated pneumoconiosis.

   (b) section 718.305. Where the claim was filed before January 1, 1982, there is a rebuttable presumption of total disability due to pneumoconiosis if the miner has proven fifteen (15) years of coal mine employment and there is other evidence demonstrating the existence of a totally disabling respiratory or pulmonary impairment.

(c) section 718.306. Rebuttable presumption of entitlement applicable to cases where the miner died on or before March 1, 1978, and was employed in one or more coal mines prior to June 30, 1971.

4. Physician's opinion based upon objective medical evidence. section 718.202(a)(4).

The U.S. Court of Appeals for the Third Circuit has held that, in considering whether the presence of pneumoconiosis has been established, "all types of relevant evidence must be weighed together to determine whether the claimant suffers from the disease." Penn Allegheny Coal Co. v. Williams, 114 F.3d 22 (3d Cir. 1997).

X-ray evidence § 718.202

Under section 718.202(a)(1) the existence of pneumoconiosis can be established by chest X-rays conducted and classified in accordance with section 718.102. The record contains the following current X-ray interpretations summarized in the following table.

DATE OF X-RAY	DATE READ	EX. NO.	PHYSICIAN	RADIOLOGICAL CREDENTIALS	I.L.O. CLASSIFICATION
04/27/01	04/27/01	DX-12	Stempel	unknown	Not provided
04/27/01	06/03/01	DX-13	Navani	BCR, BR	Negative
08/22/02	09/01/02	DX-45	Rashid	—	small opacities

It is well-established that the interpretation of an X-ray by a B-reader may be given additional weight by the fact-finder. Aimone v. Morrison Knudson Co., 8 B.L.R. 1-32, 34 (1985); Martin v. Director, OWCP, 6 B.L.R. 1-535, 537 (1983); Sharpless v. Califano, 585 F.2d 64, 666–67 (4th Cir. 1978). The Board has also held that the interpretation of an X-ray by a physician who is a B-reader as well as a Board-certified radiologist may be given more weight than that of a physician who is only a B-reader. Scheckler v. Clinchfield Coal Co., 7 B.L.R. 1-128, 131 (1984). In addition, the judge is not required to accord greater weight to the most recent X-ray evidence of record, but rather, the length of time between the X-ray studies and the qualifications of the interpreting physicians are factors to be considered. McMath v. Director, OWCP, 12 B.L.R. 1-6 (1988); Pruitt v. Director, OWCP, 7 B.L.R. 1-544 (1984); Gleza v. Ohio Mining Co., 2 B.L.R. 1-436 (1979).

The X-ray evidence reflects that the April 27, 2001 film was read as negative. A positive reading for the August 22, 2002 X-ray may be inferred, because Dr. Rashid's interpretation of the

X-ray reflects that small secondary opacities were present in a profusion of 1/0. DX-45; 20 C.F.R. section 718.102. Dr. Rashid characterized the X-ray results as showing "minimal fibrosis". DX-40. However, Dr. Rashid did not explain his conclusions, nor can it be determined from the evidence presented if he was the physician who first interpreted that X-ray, as the test result itself is not of record. I accord little weight to Dr. Rashid's unadorned conclusions regarding this X-ray. His opinion also loses probative value because he has no specialized credentials in the field of X-ray interpretation. DX-46.

I accord greater weight to Dr. Navani's reading of the April 27, 2001 X-ray. I do not find that a significant enough period of time lapsed between April 2001 and August 2002, so as to lend more weight to the later X-ray. Dr. Navani's interpretation is entitled to additional weight because of his expertise and credentials. He is both a B-reader and a Board-certified radiologist. DX-38. Dr. Kevin Stemple's observations regarding the results of that X-ray are inconclusive (see DX-12), and do not address whether the X-ray is positive or negative for pneumoconiosis. Although the X-ray was ordered by Dr. Mariglio, he has offered no independent opinion regarding its conclusions. See, DX-9.

I find that the X-ray evidence does not establish that Claimant has pneumoconiosis.

Biopsy or autopsy evidence, § 718.202(a)

A determination that pneumoconiosis is present may be based on a biopsy or autopsy. 20 C.F.R. § 718.202(a)(2). That method is unavailable here, because the current record contains no such evidence.

Regulatory presumptions § 718.202(a)(3)

A determination of the existence of pneumoconiosis may also be made using the presumptions described in sections 718.304, 718.305, 718.306. Section 718.304 requires X-ray, biopsy, or equivalent evidence of complicated pneumoconiosis, a condition not present in this case. Section 718.305 is not applicable because this claim was filed after January 1, 1982. Section 718.305(e). Section 718.306 is only applicable in the case of a deceased miner who died before March 1, 1978. None of these presumptions is applicable, and, therefore, the existence of pneumoconiosis has not been established under section 718.202(a)(3).

Physicians' opinions § 718.202(a)(4)

The fourth way to establish the existence of pneumoconiosis under 20 C.F.R. § 718.202 is set forth as follows in subparagraph (a)(4).

> A determination of the existence of pneumoconiosis may also be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers or

> suffered from pneumoconiosis as defined in section 718.201. Any such finding shall be based on objective medical evidence such as blood- gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

20 C.F.R. section 718.202(a)(4). Section 718.204(a) defines pneumoconiosis as "a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment" and "includes both medical, or 'clinical,' pneumoconiosis and statutory, or 'legal,' pneumoconiosis." Section 718.201(a)(2) broadly defines legal pneumoconiosis as any "chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." Section 718.201(b) provides:

> [A] disease "arising out of coal mine employment" includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.

In addition, section 718.201(c) states that pneumoconiosis is a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure."

Section 718.104(a) requires that a physician's report of a physical examination contain the miner's medical and employment history, all manifestations of chronic respiratory disease, if heart disease is found, all symptoms and significant findings, and the results of a chest X-ray, and a pulmonary function test unless contraindicated.

Because examination of Claimant including his submission to pulmonary function tests ("PFT"), arterial blood gas studies ("ABGS"), EKG and exercise test, those test results are summarized below.

Pulmonary Function Tests

DATE	EX. NO.	PHYSICIAN	AGE	HGT	FEV_1	MVV	FVC	EFFORT	QUALIFIES
04/27/01	DX-11	Mariglio	56	68"	2.74	115	3.27	Poor	No
08/22/02	DX-41	Rashid	57	68"	2.74 2.71*	99 76.5*	3.34 3.36*	Good Good*	No No*

* post-bronchodilator

Claimant's PFT of April 27, 2001 was interpreted by Joseph A. Mariglio, M.D., FCCP, who concluded that the results demonstrated that Claimant has a mild restrictive ventilatory defect. DX-11. The technician who administered the test wrote: "patient's ability to perform efforts consistantly (sic) for both the FVC and MVV maneuver were poor." DX-11. Dr. Mariglio supervised the testing and signed the report. No evidence was offered to rebut Dr. Mariglio's conclusions, and I therefore accord them substantial weight. I find the doctor's opinions to be credible and reliable, in reliance upon his exceptional credentials. Dr. Mariglio is board-certified in internal medicine and in pulmonary medicine. DX-39. I find that the results of this PFT are valid and provide probative value.

Claimant's PFT of August 22, 2002 was interpreted by Dr. Abdul Rashid, M.D., who concluded that the test results were normal. DX-41. Dr. Rashid is board-certified in internal medicine, and trained at the Institute of Diseases of the Chest at Brompton University of London, England. DX-46. The doctor also served as medical superintendent at the Chest and Tuberculosis Hospital, Faisalabad, Pakistan. Id. The evidence regarding this test is uncontroverted. Dr. Rashid's experience and qualifications enhance his conclusions, and I find that they are entitled to substantial weight.

Arterial Blood Gas Studies

Dr. Krol did not conduct an ABGS, in consideration of a request by Claimant's treating physician. DX-10. Dr. Rashid determined that the results of the ABGS that he conducted were normal. DX-40. Dr. Rashid concluded that Claimant's exercise stress test was negative (DX-44), although his EKG of August 22, 2002 was abnormal, indicating "coronary heart disease" (DX-43, 40). Dr. Rashid's opinion is unrebutted in the record. I find that it is entitled to substantial weight.

Physician's Opinions

In his report of examination of Claimant, Dr. Krol documented his reported symptoms, including attacks of wheezing "in last 2-3 years", "miner's asthma", daily sputum and wheezing, and nocturnal dyspnea. DX-9. The doctor noted that Claimant reported a torn meniscus of the right knee, as well as arthritis of the wrist, shoulder and elbow. Id. Claimant reported no surgeries or hospitalizations, and stated that he had never smoked. Id. The doctor's examination showed that Claimant's lungs were normal to inspection, palpation, and percussion and his ausculation was clear. Dr. Krol concluded that Claimant had no chronic respiratory or pulmonary disease, but recommended a follow up chest X-ray with his family doctor. DX-9.

Dr. Rashid's report of examination of the Claimant on August 22, 2002 noted that he had experienced frequent colds since the year 2000, and attacks of wheezing since 1998. DX-40. Claimant reported no hospitalizations, surgeries, or other significant conditions or serious illnesses. Claimant complained of daily sputum, wheezing and cough, as well as chest pain and nocturnal dyspnea. Id. The doctor noted that Claimant complained of "s[hortness] o[f] b[reath]

[with] climbing stairs, little exertion, with walking and lifting heavy material. Id. Dr. Rashid's exam revealed coronary artery disease and atherosclerosis, and he found that Claimant had obesity. However, Dr. Rashid concluded that Claimant has no chronic respiratory or pulmonary disease. DX-40.

The opinions of the examining physicians are uncontroverted. Although Claimant testified that he regularly sees his treating physician who advised him that he has "black lung", (herein, supra.) his treatment records are not in evidence, nor is an opinion by his treating doctor regarding whether Claimant has pneumoconiosis.

In consideration of the totality of the evidence, I do not find that the physician opinion evidence supports a finding of pneumoconiosis.

Weighing all of the evidence together, like and unlike, I find that Claimant has not established that he has pneumoconiosis.

2. Pneumoconiosis Arising Out of Coal Mine Employment

Had Claimant established the presence of pneumoconiosis he would be entitled to a rebuttable presumption that the pneumoconiosis arose out of his coal mine employment, since Claimant established a history of at least 10 years of such work. 20 C.F.R. § 718.203. However, this presumption cannot be applied as Claimant has failed to show that he has pneumoconiosis. Claimant has not established this element of entitlement.

3. Total Disability

Assuming arguendo that Claimant had demonstrated that he has pneumoconiosis, he would need to establish that he is totally disabled due to a respiratory or pulmonary condition. Total disability is defined in section 718.204(b)(1) as follows:

> A miner shall be considered totally disabled if the miner has a pulmonary or respiratory impairment which, standing alone, prevents or prevented the miner (i) [f]rom performing his or her usual coal mine work; and (ii) [f]rom engaging in [other] gainful employment in a mine or mines.

20 C.F.R. § 718.204(b)(1). Nonpulmonary and nonrespiratory conditions which cause an "independent disability unrelated to the miner's pulmonary or respiratory disability" have no bearing on total disability under the Act. § 718.204(a); see also Beatty v. Danri Corp., 16 B.L.R.

1-1 (1991), aff'd as Beatty v. Danri Corp. & Triangle Enterprises, 49 F.3d 993, 1000 (3d Cir. 1995).[3] Finally, § 718.204(a) also provides that

> If, however, a non-pulmonary or non-respiratory condition or disease causes a chronic respiratory or pulmonary impairment, that condition shall be considered in determining whether the miner is or was totally disabled [under the Act].

20 C.F.R. § 718.204(a).

Claimant may establish total disability in one of four ways: pulmonary function study; arterial blood gas study; evidence of cor pulmonale with right-sided congestive heart failure; or reasoned medical opinion. § 718.204(b)(2)(i–iv). A presumption of total disability is not established by a showing of evidence qualifying under a subsection of § 718.204(b)(2), but rather such evidence shall establish total disability in the absence of contrary evidence of greater weight. Gee v. W.G. Moore & Sons, 9 B.L.R. 1-4 (1986). All medical evidence relevant to the question of total disability must be weighed, like and unlike together, with Claimant bearing the burden of establishing total disability by a preponderance of the evidence. Rafferty v. Jones & Laughlin Steel Corp., 9 B.L.R. 1-231 (1987).

Pulmonary Function Studies

In order to establish total disability through pulmonary function tests (i.e., by "qualifying" tests), the FEV1 must be equal to or less than the values listed in Table B1 (males) or Table B2 (females) of Appendix B to this part, and, in addition, the tests must also reveal either: (1) values equal to or less than those listed in Table B3 (males) or Table B4 (females) for the FVC test, or (2) values equal to or less than those listed in Table B5 (males) or Table B6 (females) for the MVV test, or (3) a percentage of 55 or less when the results of the FEV_1 test are divided by the results of the FVC tests. 20 C.F.R. § 718.204(b)(2)(i)(A)–(C).

Dr. Joseph A. Mariglio, M.D., FCCP, concluded that Claimant has a mild restrictive ventilatory defect, based upon the results of his PFT of April 27, 2001. DX-11. Despite this credible opinion, the results of the pulmonary function studies, summarized supra., are non-qualifying. Accordingly, I find that Claimant has not established total disability through this means.

Arterial Blood Gas Study

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[3]This case arises in the jurisdiction of the Third Circuit because the miner's coal mine employment took place in Pennsylvania.

Under section 718.204(b)(2)(ii), total disability can also be established by qualifying arterial blood gas studies. The arterial blood gas study that Claimant underwent is discussed herein, supra. The test result is non-qualifying, and does not establish total disability.

Cor Pulmonale

Under 20 C.F.R. §718.204(b)(2)(iii), total disability can also be established where the miner had pneumoconiosis and the medical evidence shows that he suffers from cor pulmonale with right-sided congestive heart failure. There is no record evidence of cor pulmonale with right-sided congestive heart failure. Claimant has not established disability under this regulation.

Medical Opinions

The remaining means of establishing total disability is with the reasoned medical judgment of a physician that Claimant's respiratory or pulmonary condition prevents him from engaging in his usual coal mine work or comparable and gainful work. Such an opinion must be based on "medically acceptable clinical and laboratory diagnostic techniques." 20 C.F.R. § 718.204(b)(2)(iv).

Both of the doctors who examined Claimant found that he had no impairment that would prevent him from performing his last coal mine employment. DX-9; DX-40. Dr. Krol concluded that Claimant's "arthritis with need for surgery of knee would prevent [him] from heavy lifting". DX-9. Dr. Rashid responded to supplemental questions to his report of examination:

1. Is the claimant disabled by a respiratory condition?

   [Response:] No

2. Is the claimant disabled by coal workers' pneumoconiosis?

   [Response:] No

3. If the presence of pneumoconiosis was conceded would the claimant be disabled by the pneumoconiosis?

   [Response:] No

DX-40.

The opinions of the doctors are uncontroverted. Although Dr. Mariglio believed that Claimant has a mild restrictive ventilatory defect, he did not indicate that he believed that disorder to be disabling. DX-11. No evidence of record demonstrates that Claimant has a respiratory

impairment that is disabling within the meaning of the Act. I find that the opinions of Drs. Krol and Rashid are well reasoned and based on the totality of evidence, and accordingly, are entitled to substantial weight.

Based on the foregoing, Claimant has not established that he is totally disabled due to a pulmonary or respiratory condition.

4. Total Disability Due to Pneumoconiosis

Assuming arguendo that Claimant had proven total disability, he must prove that his total disability is due to pneumoconiosis. 20 C.F.R. § 718.204(a). A miner is considered totally disabled due to pneumoconiosis if the pneumoconiosis is a "substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment." 20 C.F.R. § 718.204(c). Pneumoconiosis is a substantially contributing cause of the miner's disability if it has a "materially adverse effect on the miner's respiratory or pulmonary condition or materially worsens a totally disabling respiratory or pulmonary impairment that is caused by a disease unrelated to coal mine employment." 20 C.F.R. §718.204(c)(1)(i)–(ii). Section 718.204(c)(2) provides that "the cause or causes of a miner's disability shall be established by means of a physician's documented and reasoned medical report." 20 C.F.R. § 718.204(c)(2).

Claimant has not shown that he is totally disabled, or that he has a disability arising out of pneumoconiosis. Accordingly, Claimant has not established this element of entitlement.

D. CONCLUSION

As Claimant has not established any element of entitlement other than his history of coal mine employment, he is not entitled to benefits under the Act, and his claim must be denied.

ATTORNEY'S FEE

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for representation services rendered in pursuit of the claim.

ORDER

The claim of ELMER GEORGE for benefits under the Act is DENIED.

A

Janice K. Bullard
Administrative Law Judge

Cherry Hill, New Jersey

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of this Notice of Appeal must also be served on Donald S. Shire, Associate Solicitor for Black Lung Benefits, 200 Constitution Avenue, N.W., Room N-2117, Washington, DC 20210.